

March 27, 2017

Submitted electronically via: FCC's Electronic Comment Filing System (ECFS)

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW Room TW-A325  
Washington, DC 20554

**Re: Petition for Rulemaking and Declaratory Ruling Regarding Prior Express Consent under the Telephone Consumer Protection Act of 1991 (CG Docket Nos. 02-278 and 05-338)**

Dear Ms. Dortch:

The Pharmaceutical Care Management Association (PCMA) appreciates the opportunity to submit reply comments on the public notice seeking comments on a petition for rulemaking and declaratory ruling filed by Craig Moskowitz and Craig Cunningham (Petitioners) (hereafter, the "public notice"), regarding "prior express consent" under the Telephone Consumer Protection Act (TCPA) issued by the Federal Communications Commission (FCC) on February 8, 2017. PCMA is the national association representing America's pharmacy benefit managers (PBMs), which administer prescription drug plans and operate specialty pharmacies for more than 266 million Americans with health coverage through Fortune 500 companies, health insurers, labor unions, Medicare, Medicaid, the Federal Employees Health Benefits Program, and the Health Insurance Marketplaces established by the Affordable Care Act (ACA).

The Petitioners seek the initiation of rulemaking to overturn the FCC's interpretation that 'prior express consent' includes implied consent resulting from a party providing a telephone number to the caller. In particular, the Petitioners urge the FCC to adopt a rule requiring that every call made to either a wireless or residential line be placed pursuant to consent that is expressly stated, specifically pertaining to autodialed calls, at a specified number, and in writing.

Telephonic outreach plays an important role in improving healthcare outcomes. We are concerned that the Petitioner's request will discourage and add considerable burden to important healthcare communications that are allowed and encouraged by healthcare agencies and stringently regulated by the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

**1. Improved Health Outcomes**

PCMA strongly supports initiatives to improve the health of individuals, including health-related communications made to patients. Health plans and their PBMs engage with patients on a wide variety of health-related coverage issues to ensure the effective utilization of benefits, which may include patient outreach efforts that play a critical role in improving health outcomes among enrollees. Research has shown that healthcare-related calls lead to more engaged patients, better health outcomes, and lower costs for patients. Telephonic communication is particularly important for improving treatment adherence. Roughly 20% to 30% percent of prescriptions are never retrieved and up to 50% percent of medications are not taken as prescribed. Telephone outreach, to be effective, needs to use technology that is an automatic telephone dialing system (ATDS). Member outreach on a large scale simply cannot occur without these technologies.

## 2. HIPAA Safeguards

HIPAA and the Privacy Rule issued pursuant to HIPAA regulate the use of protected health information (PHI), which includes telephone numbers. HIPAA provides that a covered entity may use or disclose protected health information for its own treatment, payment or healthcare operations.<sup>1</sup> HIPAA also applies to covered entities' business associates, which include service providers to the covered entities needing access to PHI to perform their services.<sup>2</sup> These uses and disclosures do not require a HIPAA authorization from the individual "to avoid interfering with, or unnecessarily burdening communications about, treatment or about the benefits and services of health and health care providers."<sup>3</sup> HIPAA imposes strict safeguards to protect PHI and also prohibits its use for defined marketing purposes without a HIPAA authorization.

## 3. Government Agencies Encourage Outreach

The Department of Health and Human Services (HHS) has made clear that healthcare activities to improve patient health and the like are not marketing activities requiring separate HIPAA authorization. In fact, the Centers for Medicare and Medicaid Services (CMS) has encouraged these types of communications. For example, Part D plan sponsors are required to improve adherence, which in many instances are conducted through telephonic communication with patients. Additionally, CMS (and many state departments of insurance) have a requirement for plans and/or utilization management (UM) companies to notify individuals of coverage determination decisions as quickly as possible, which are traditionally conducted by phone. Similarly, Medicaid managed care organizations that contract with state Medicaid agencies are required to engage in telephonic communications with patients for a number of healthcare reasons, including compliance with care regimens.<sup>4</sup>

***PCMA Recommendation: PCMA recommends that the FCC deny the Petitioner's request and continue to interpret the TCPA in a way that allows consumers to receive non-telemarketing calls permitted under HIPAA. Specifically, we support the FCC interpretation that the provision of a phone number to a covered entity or business associate constitutes prior express consent for non-telemarketing calls allowed under HIPAA for the purposes of treatment, payment, and healthcare operations.***

We appreciate your consideration of our comments. If you have any questions, please contact me at [wkrasner@pcmanet.org](mailto:wkrasner@pcmanet.org) or Mona Mahmoud at [mmahmoud@pcmanet.org](mailto:mmahmoud@pcmanet.org).

Sincerely,



Wendy Krasner  
Vice President, Regulatory Affairs

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<sup>1</sup> 45 C.F.R. § 164.506(c)(1).

<sup>2</sup> 45 C.F.R. § 160.103.

<sup>3</sup> Standards for Privacy and Individually Identifiable Health Information; Final Rule, 67 Fed. Reg. 53182, 53183 (8/14/2002).

<sup>4</sup> For example, Kansas requires texts to provide prevention information; Louisiana requires use of Text4baby, and Indiana requires provision of care management services by telephone.